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No. 86-2020

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1987

CAROL MACZKO, PETITIONER

*v.*

TERRENCE JOYCE, OFFICER IN CHARGE,
UNITED STATES POSTAL SERVICE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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**MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

Petitioner, who because of her handicap worked a four-hour day both before and after the period for which she was not employed, contends that the district court had subject-matter jurisdiction to issue a writ of mandamus compelling the United States Postal Service to compute her backpay for that period under an Equal Employment Opportunity Commission (EEOC) decision on the basis of an eight-hour workday.

1. a. In 1977, petitioner began working as a distribution clerk for the United States Postal Service in Akron, Ohio. In 1979 and again in 1980, petitioner was hospitalized for a leg condition later diagnosed as thrombophlebitis. Pet. App. A3-A4, A12. On February 7, 1980, petitioner's physician indicated to the Postal Service that petitioner's workday should be limited to four hours. Accordingly, on her return to work during that month, petitioner was given a "light duty" assignment with a four-hour workday. *Id.* at A12-A13.

Following another hospitalization, petitioner asked in 1981 that she again be given a light duty assignment with

the work restrictions requested by her physician. Her physician's report stated that she should "try" working four hours a day. Pet. App. A14-A15. The Postal Service denied her request. Petitioner then filed a complaint with the EEOC alleging discrimination on the basis of sex, reprisal, and discrimination on the basis of physical handicap (*id.* at A9-A10). A complaints examiner, in a decision issued September 28, 1984, recommended "a finding of discrimination base[d] on handicap and no discrimination based on sex and reprisal" (*id.* at A21). The complaints examiner recommended that "the Complainant be reinstated with reasonable accommodation; [and] be awarded backpay, seniority and benefits that may have accrued since the effective date of the denial of the Complainant's request for light duty deducting any duplicative award the Complainant may have received prior to issuance of this decision" (*id.* at A21-A22). On December 15, 1984, the Postal Service adopted the complaints examiner's recommendation as the final agency decision (*id.* at A22-A27). Petitioner has been reinstated to a four-hour-a-day light duty assignment.

b. When petitioner had not received a backpay award by August 1985, she filed a petition for a writ of mandamus in federal district court—purportedly pursuant to 28 U.S.C. 1651(a) and 28 U.S.C. 1361—seeking a mandatory injunction against the Postal Service directing it " 'to comply with the final decision(s) and recommended corrective action of the EEOC which was dated December 15, 1984' " (Pet. App. A29). Thereafter, the Postal Service paid petitioner $46,423 in back wages. That amount was based on what petitioner would have received if she had worked four hours a day during the period for which she was entitled to backpay—as she had done before that period, as she has done since that period, and as her physician had requested that she be allowed to "try" to do during that period. Petitioner maintained, however, that

the EEOC decision entitled her to $112,491 in backpay, based on a full eight-hour workday. Pet. App. A45-A46. The Postal Service moved to dismiss the petition for lack of subject-matter jurisdiction, asserting that the All Writs Act, 28 U.S.C. 1651,[1] is not an independent grant of jurisdiction to the federal courts and that the mandamus statute, 28 U.S.C. 1361,[2] confers subject-matter jurisdiction in the district court only to compel a federal officer to perform some purely ministerial duty.

The district court agreed with the government's arguments and thus dismissed the petition, stating (Pet. App. A35, A37) that the All Writs Act "has been uniformly construed by the federal courts to not confer any subject matter jurisdiction upon the courts," and that the Act "can only assist the court in providing a remedy when an independent basis for jurisdiction is present." The court further concluded that the mandamus statute could not serve as an independent basis of jurisdiction because the order being sought by the petitioner did not involve the mere ministerial or mandatory duty of a federal official but instead sought to have the court enforce and interpret the EEOC decision (*id.* at A38-A39). Moreover, the court held that mandamus jurisdiction does not lie in the district

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[1] Section 1651 states in pertinent part:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

[2] 28 U.S.C. 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

courts to permit the adjudication and awarding of unliquidated and disputed sums as damages (*id.* at A39).[3]

The court of appeals affirmed, noting that "it is well settled that a federal court must have an independent basis for subject matter jurisdiction for a writ of mandamus to be issued pursuant to 28 U.S.C. § 1651(a)." Pet. App. A5 (citing *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34-35 (1980) (per curiam)). Hence, concluded the court of appeals, if subject-matter jurisdiction were to exist in petitioner's case, it would have to be established under 28 U.S.C. 1361 (Pet. App. A5-A6). The court held, however, that subject-matter jurisdiction did not exist under Section 1361 because petitioner "seeks a writ of mandamus to enforce a provision of an EEOC decision which is subject to differing interpretations and is in fact disputed" (Pet. App. A7).

In so ruling, the court of appeals first observed that jurisdiction under Section 1361 "is inextricably bound with the merits of whether a writ of mandamus should issue; in order to establish either jurisdiction or entitlement to the writ, a court must find that a duty is owed to the plaintiff" (Pet. App. A6). Second, the court of appeals noted that there must be a mandatory or ministerial obligation in order for there to be a duty owed to the petitioner within the meaning of Section 1361. Further, continued the court, "[a] duty is not 'owed' unless the obligation is ' "plainly defined and peremptory." ' " Pet. App. A6

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[3] The court also rejected (Pet. App. A39-A40) petitioner's argument that it had original jurisdiction over her claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, since petitioner had failed to comply with the procedural requirements of that Act. Petitioner did not press this basis for jurisdiction in the court of appeals, but did maintain that subject-matter jurisdiction exists under the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.* Because petitioner did not raise the Rehabilitation Act as a basis for jurisdiction in the district court, however, the court of appeals declined to address the issue for the first time on appeal (Pet. App. A5).

(quoting *United States* v. *Battisti,* 486 F.2d 961, 964 (6th Cir. 1973), quoting *Albert* v. *United States District Court,* 283 F.2d 61, 62 (6th Cir. 1960), cert. denied, 365 U.S. 828 (1961)). The court concluded (Pet. App. A6):

> Although the Postal Service had a duty to comply with the EEOC decision, the terms of that order are not readily ascertainable; in fact, the parties disagree as to the meaning of the final order concerning the amount of backpay required. We conclude that when a duty is disputed or subject to various interpretations, for instance when unliquidated damages are involved, the duty is not "owed" in that the obligation to do a particular act cannot be said to be clear, peremptory, defined or ministerial within the meaning of section 1361.

2. The decision of the court of appeals is correct, does not conflict with any decision of this Court or another court of appeals, and raises no significant legal issue. Therefore, further review by this Court is unwarranted.

a. Petitioner does not (see Pet. 12), nor can she, seriously challenge the holding of the court of appeals that a federal court must have an independent basis for subject-matter jurisdiction in order to issue a writ of mandamus. Indeed, it is undisputed that under the All Writs Act, courts may issue a writ of mandamus only when "necessary or appropriate in aid of their respective juridictions." 28 U.S.C. 1651(a). See *Allied Chemical Corp.* v. *Daiflon, Inc.,* 449 U.S. at 34-35.

b. Petitioner also agrees that mandamus will not lie under Section 1361 "unless the alleged duty imposes a mandatory or ministerial obligation" (Pet. 13). Indeed, this Court has, over and over again, commented that the drastic nature of mandamus makes it a remedy available only when the right asserted is "clear and indisputable." *United States* v. *Duell,* 172 U.S. 576, 582 (1899); see *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379,

384 (1953); *Will* v. *United States,* 389 U.S. 90, 96 (1967); *Kerr* v. *United States District Court,* 426 U.S. 394, 403 (1976); *Allied Chemical Corp.* v. *Daiflon, Inc.,* 449 U.S. at 36.[4] Whatever can be said about petitioner's claim, the recommendation of the complaints examiner certainly gives her no "clear and indisputable" right to backpay computed on the basis of an eight-hour workday. That recommendation did not specify the exact amount of backpay to be awarded to petitioner, identify the formula for calculation of backpay, or indicate in any way that the Postal Service, by denying petitioner the four-hour-a-day assignment that she requested, became liable to pay her for an eight-hour-a-day position.

The holding of the court of appeals—that "when a duty is disputed or subject to various interpretations, for instance when unliquidated damages are involved, the duty is not 'owed' in that the obligation to do a particular act cannot be said to be clear, peremptory, defined or ministerial" (Pet. App. A6)—is in accord with settled law. Other federal courts have reached the same conclusion. See, *e.g., Spaulding* v. *Nielsen,* 599 F.2d 728 (5th Cir. 1979); *Pope* v. *United States,* 9 Cl. Ct. 479, 487 (1986); *United States* v. *Pennsylvania,* 394 F. Supp. 261, 263-65 (M.D. Pa. 1975).

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[4] This requirement is *in addition to* the requirement that "the party seeking issuance of the writ have no other adequate means to attain the relief he desires" (*Kerr,* 426 U.S. at 403). Thus, petitioner's assertions that she has no remedy other than mandamus, even if they were true, would not by themselves suffice to give her any rights under Section 1361. We therefore do not address in any detail the options other than mandamus that might have been open to petitioner. We note, however, that she has never asked the complaints examiner or the EEOC to clarify the decision on which she bases her claim.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
*Solicitor General*

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